



INTERIOR BOARD OF INDIAN APPEALS

Estate of Rose Josephine LaRose Wilson Eli

2 IBIA 60 (09/14/1973)

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ESTATE OF

ROSE JOSEPHINE LaROSE WILSON ELI, DECEASED

IBIA 74-13

Decided September 14, 1973

The appeal is from a decision denying a petition for reopening. This is a notice of docketing of the appeal and a decision of remand for further hearing dispensing with the filing of briefs by interested parties.

Docketed, reversed and remanded.

Indian Probate: Reopening: Generally--Indian Probate: Appeal: Standing to Appeal

Although the Superintendent of an Indian Agency has no interest in the outcome he is a proper official of the Bureau of Indian Affairs to file a petition for reopening and to appeal from a denial thereof under authority of 43 CFR 4.242(d).

Indian Probate: Administrative Procedure: Applicability to Indian Probate

The requirement of the Administrative Procedure Act, that all decisions of a Judge shall include a statement of findings and conclusions, on all the material issues of fact, law, or discretion presented on the record, is mandatory and applicable to all decisions of Judges in Indian Probate proceedings.

Indian Probate: Administrative Procedure: Official Notice, Record

Official notice of documents and records will not be taken unless they are introduced in evidence or unless an order or stipulation provides to the contrary.

Indian Probate: Wills: Proof of Will

No will can be approved as self-proved unless the record supports a finding by the Judge

that such will and the affidavits accompanying it have been presented at the hearing to all parties present for consideration and that it is uncontested. Such findings may then support a conclusion that the documents meet the requirements of 43 CFR 4.233(a), and that it may be ordered approved.

APPEARANCES: Richard K. Aldrich, for the Field Solicitor, Billings, Montana, appearing for the Bureau of Indian Affairs (Superintendent of the Flathead Agency), appellant. There has been no appearance made for the appellees.

OPINION BY MR. McKEE

The final order approving will and decree of distribution was entered in this matter on the 29th of September, 1972. Subsequently a petition for reopening within the provisions of 43 CFR 4.242 was filed with the Administrative Law Judge, Robert C. Snashall, on July 5, 1973, by Albert M. Rennie, Acting Superintendent for the Flathead Indian Agency. The petition for reopening was denied by the Judge on July 20, 1973, and a notice of appeal was timely filed on August 10, 1973, by the Bureau of Indian Affairs. The

record of the case was transmitted by the title plant in Portland and was received by this Board on August 27, 1973.

NOTICE IS HEREBY GIVEN: That a notice of appeal has been filed by the Bureau of Indian Affairs, acting through its attorney, the Field Solicitor of the Department of Interior, Billings, Montana. This is docketed as an appeal under the above designated number.

The decedent, Rose Josephine Eli, Allottee No. 101, was a Northern Idaho Indian who died testate February 7, 1972. By his order of September 29, 1972, the Judge approved a will dated "November 17, 1971." He ordered distribution made to Jonathon James Tsoodle of one third of the residue of the estate including land interests on the Flathead Indian Reservation in Montana. The following statement is found in the appellant's petition for reopening dated July 2, 1973, in regard to such order.

1. The order, approving the will and decree of distribution, dated September 29, 1972, No. IP PO 187L 72-301, does not comply with the Indian Reorganization Act of June 18, 1934 (25 U.S.C. 464). The devisee, Jonathon James Tsoodle, named in paragraph V(c) of the Last Will and Testament, executed November 11, 1971, is not an heir at law. He is the son of Elizabeth Tsoodle, who is living, and the grandson of Rose Josephine LaRose Eli, deceased. This information is contained in paragraph I and V(c) of the decedent's Last Will and Testament.

Section 4 of the Act (25 U.S.C. § 464) prevents testamentary disposition of land interests on an organized reservation to anyone who is not either an heir of the testator or a member of the tribe having jurisdiction of the land in question.

The Confederated Tribes of the Flathead Reservation voted to come under the Act. As long as the intermediate parent is still living it is undisputed that the grandchild of a decedent cannot be the heir of the decedent under the laws of the State of Montana. Furthermore, there is no showing that Jonathon James Tsoodle is an enrolled member of the Flathead Tribes, and he is therefore ineligible to receive the devise of the Flathead interests made to him by his grandmother.

Disregarding the foregoing statute and law the Judge made the following statement in his order of July 20, 1973, in which he denied the petition for reopening.

I am not unmindful of the dictates of the Wheeler-Howard Act (25 U.S.C. § 464) nor of the cases holding the primary purpose of section 4 of the Act to prevent the alienation of restricted Indian lands to strangers. (Citing cases.) But in view of the fact it can hardly be said devisee, Jonathon James Tsoodle is a "stranger" to the lands of his grandmother and the amount in question is de minimus it appears reopening of this estate for the purposes outlined in the petition of July 5, 1973 is unwarranted.

We cannot agree with the Judge, and we reaffirm the conclusion reached by the Solicitor in Estate of Chris Trudell, IA-D-6 (March 16, 1967); Estate of Emma Blowsnake Goodbear Mike, A/K/A Emma Walking Priest, IA-916 (October 26, 1960). Therefore his decision in this matter should be reversed.

This decision disposes of the single purely legal ground advanced by the appellant which is a proper party although it has no interest in the outcome. See Estate of Ellen Fitzpatrick, IA-T-5 (Supp.) (November 5, 1968); Estate of Gi-we-bi-nes-i-kwe, IA-D-19 (March 1, 1968); Estate of Billy Smith, A/K/A Billy Pecwan, IA-S-3 (December 31, 1969); 25 CFR 1.2 and 43 CFR 4.242(d).

This matter could be disposed by the foregoing decision, but further examination of the record reveals that there are additional reasons for reopening the estate. Further hearing in connection with the approval of the will and the determination of the decedent's heirs under the laws of the various states in which decedent held land interests is needed for the following reasons.

As noted above, in his order of September 29, 1972, the Judge approved a will dated "November 17, 1971," but no such will was found in the record. There is a xerox copy of a document purported

to be the Last Will and Testament of Rose Mary Eli, dated "November 11, 1971."

The only reference to the will at the hearing held at Lapwai, Idaho, on August 22, 1972, is as follows:

JUDGE: Alright, each of those claims will be allowed. Now, as I understand it, I believe when I asked you off the record you stated that you were familiar with the Last Will and Testament of your wife, Rose Eli, dated the 17th (sic) of November 1971, is that correct - you are familiar with what it says?

GIBSON ELI: Yes.

Q: Are you familiar too Elizabeth?

ELIZABETH TSOODLE: Yes.

Q: Then do I understand it you will waive the reading of the will then now?

GIBSON ELI: Yes.

ELIZABETH TSOODLE: Yes.

(Tr. 3-4)

Since this is the only evidence in the record concerning any will, the provisions of 43 CFR 4.233 concerning self-proved wills have not been met even if it is assumed, which we do not, that the will under consideration at the hearing was the one dated "November 11, 1971," rather than the one dated "November 17, 1971."

Under the decisions in Estate of Charles Cordier (41560-38) and Estate of Charles Clement Richard, IA-1260 (July 15, 1963), there must be sufficient credible testimony in the record to support a finding that the will in question and the accompanying affidavits meet the requirements of 43 CFR 4.233(a). Furthermore, the original must be either offered in evidence or accounted for to defeat any presumption that the original was destroyed by the testatrix with an intent to revoke it.

A further deficiency in the proceedings is noted in that although the Judge did appoint Elizabeth Tsoodle as the guardian for her son Jonathon as a minor, there is no indication as to his age or birth date.

More importantly, however, it appeared at the hearing that the decedent's son, Leon Alexander is and was a mental incompetent, but no guardian ad litem was appointed for him. The true legal status of Leon Alexander shall first be determined, and if appropriate, a guardian ad litem should be named to represent his interests in further proceedings. In any event, notice of all further proceedings shall be given to him, or his guardian ad litem or to his personal representative duly appointed and qualified under an order of a court of the State of his residence.

He or his guardian must then be given an opportunity to object to whatever will is under consideration.

A finding is made that the record in this matter is inadequate as it does not sustain the approval of the will dated November 11, 1971, or one dated November 17, 1971. A finding is made that the case should be reopened and remanded. Further hearing shall accordingly be held for correction of the record at which time official notice of documents and records will not be taken unless they are introduced in evidence or an order or stipulation provides to the contrary.

The requirement of the Administrative Procedure Act, that all decisions of a Judge shall include a statement of findings and conclusions, on all the material issues of fact, law, or discretion presented on the record, is mandatory and applicable to all decisions of Judges in Indian Probate proceedings.

A further finding is made that no purpose would be served by providing for the filing of statements or briefs by any party at this point and none will be accepted.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1,

we REVERSE the order denying the petition for reopening; and do hereby reopen the probate; and we REMAND the case to the Administrative Law Judge for a rehearing, and he shall issue a decision including findings of fact as to whether this decedent died leaving a valid will, and as to who her heirs may be, and to make such final order of distribution as may be indicated, subject to the right of appeal, all pursuant to 43 CFR 4.200 et seq.

It is further ordered that the Judge may in his discretion order the payment of allowed claims and fees pending issuance of the final decision in this case.

//original signed
David J. McKee, Chairman

I concur:

//original signed
Mitchell J. Sabagh, Member